

SERVED: December , 1994

NTSB Order No. EA-4273

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1994

Petition of)

BENTON W. BULLWINKEL,)

for review of the denial by)
the Administrator of the)
Federal Aviation Administration)
of the issuance of an airman)
medical certificate.)

Docket SM-3938

OPINION AND ORDER ON REMAND

The U.S. Court of Appeals for the Seventh Circuit vacated and remanded for further consideration our decision in NTSB Order No. EA-3823 (served March 22, 1993).¹ There, we reversed the law judge and upheld the Administrator's denial of petitioner's application for an unrestricted third-class airman medical certificate. The Administrator based his denial on petitioner's "history of mood swings, attention deficit disorder and the use

¹Bullwinkel v. FAA and NTSB, No. 93-1803 (7th Cir., decided April 27, 1994).

of disqualifying medication (lithium and Ritalin),"² which, he concluded, rendered petitioner unqualified for an airman medical certificate under section 67.17(d)(1)(ii), (d)(2)(ii), and (f)(2) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 67).

The court held that the evidence did not support the Board's decision because 1) it was not reasonable to interpret FAR section 67.17 to include side effects of medication as disqualifying, and 2) Board precedent has unreasonably created a "no-lithium" rule.³ While the court recognized that the symptoms of lithium toxicity, namely, tremors, memory loss, loss of balance, and blurred vision, are reasonable concerns, it determined that the clear language of the regulation deals with "organic, functional or structural disease[s], defect[s], or limitation[s]," as underlying conditions, not as side effects from medications. Slip opinion at 11. The court suggests that either we find that the underlying condition is a disqualifying "personality disorder, neurosis, or mental condition," or the FAA amend its regulations to include certificate denial based on an applicant's use of prohibited medication.⁴ Slip opinion at 12.

²Petitioner revealed at the hearing that he has discontinued his use of Ritalin.

³Specifically, the court referenced Petition of Bruckner, NTSB Order No. EA-3362 (1991); Petition of Rose, NTSB Order No. EA-3260 (1991); and Petition of Doe, 5 NTSB 41 (1985).

⁴The FAA has apparently taken the court's suggestion and promulgated an emergency final rule, effective September 9, 1994. 59 Fed. Reg. 46706 (1994)(to be codified at 14 C.F.R. § 67). Sections 67.13(f), 67.15(f), and 67.17(f) are amended to provide the following basis for a denial of a medical certificate:

(3) No medication or other treatment that the

Given the court's decision, we must consider only petitioner's underlying medical condition (mild bipolar disorder) in determining whether he has met his burden to show that he is entitled to an unrestricted third-class medical certificate. The evidence adduced at the hearing is insufficient to disqualify petitioner based on his underlying condition alone. The FAA's medical expert, Dr. Pakull, testified that, from petitioner's history, it appeared that he had a hypomanic (mild manic) episode that "does not rise to the level of unacceptable," followed by a depressive episode, but that the medical record is insufficiently detailed for further evaluation. (Transcript (Tr.) at 242-43.) Dr. Pakull then testified that 1) hypomania is not a disqualifying condition; 2) there is no evidence that petitioner experienced anything other than hypomania followed by mild depression; and 3) if his medication became ineffective it appears that the underlying condition that would resurface would not be disqualifying. (Tr. at 268, 282-83.) Therefore, without considering petitioner's use of lithium, we must conclude that his underlying condition does not render him disqualified for an

(..continued)

Federal Air Surgeon finds-

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that the applicant holds or for which the applicant is applying; or

(ii) May reasonably be expected, within 2 years after the finding, to make the applicant unable to perform those duties or exercise those privileges; and the findings are based on the case history and appropriate, qualified, medical judgment relating to the medication or other treatment involved.

unrestricted third-class medical certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Board Order EA-3823 is vacated to the extent it is inconsistent with this opinion and order on remand;
2. The Administrator's appeal from the initial decision is denied;
3. The initial decision is affirmed; and
4. A third-class airman medical certificate shall be issued to petitioner upon his reapplication, provided he is otherwise and fully qualified therefore.⁵

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order. Member VOGT submitted the following concurring statement.

⁵The Board intimates no conclusion as to the effect of the FAA's amendment of 14 C.F.R. Part 67 on petitioner's reapplication.

Concurring Opinion of Member Vogt in
Petition of Benton W. Bullwinkel

I concur with the majority's holding, but am compelled to state my disagreement with the Seventh Circuit Court of Appeals' opinion. The hypertechnical opinion fails to defer to the Safety Board's reasonable interpretation of an FAA regulation. Respondent was not entitled to a medical certificate if he suffered from a functional limitation that, according to the Federal Air Surgeon, rendered or would, within two years, be reasonably expected to render respondent unable to perform the duties of an airman. The Air Surgeon made such a finding. The only issue for the Board was whether respondent's inability was the result of an organic, functional, or structural disease, defect, or limitation. His inability clearly resulted from, at least, a functional limitation. Whether that limitation was caused by respondent's bipolar mood disorder(manic depression), the effects of lithium taken to treat the disorder, or a combination of both is irrelevant. The court's finding that the Board's interpretation of this regulation was not reasonable, and further that it was plainly erroneous, is unfounded.